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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-503

GEORGE RAMSEY, et al.,

Petitioners,

v.

UNITED MINE WORKERS OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT UNITED MINE WORKERS OF AMERICA IN OPPOSITION

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BRIEF OF RESPONDENT UNITED MINE WORKERS OF AMERICA IN OPPOSITION

OPINIONS BELOW

The certiorari petition accurately notes (p. 5) that "This is the second appeal in these two cases". The district court's[1] opinion in *first Ramsey* (*Ramsey, et al.* v. *The UMWA*) is found in 265 F.Supp. 388, while the district court's opinion in *second Ramsey* (*Ramsey, et al.* v. *UMWA*) dismissing the complaints appears in 344 F.Supp. 1029.

The Sixth Circuit's[2] *first Ramsey* (*Ramsey, et al.* v. *UMWA*) [a split decision of the full Court] is found in

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[1]The United States District Court for the Eastern District of Tennessee, Southern Division (at Chattanooga), District Judge Frank W. Wilson presiding, is referred to as "district court".

[2]The United States Court of Appeals for the Sixth Circuit is referred to as "Sixth Circuit".

416 F.2d 655 (the affirming opinion, *per* Circuit Judge Edwards, at pp. 656-67, with the dissenting opinion of Circuit Judge O'Sullivan at pp. 667-76), while the Sixth Circuit's opinion in *second Ramsey* (*Ramsey et al.* v. *UMWA*) affirming the complaints' dismissal appears in 83 LRRM 2545 (the affirming opinion of Circuit Judge Edwards at pp. 2545-54 and the dissenting opinion of Circuit Judge Weick at pp. 2554-61). It is unreported in the Federal Reporter.

JURISDICTION AND BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

Jurisdictional requisites are adequately set forth in the certiorari petition (p. 3).

STATUTES AND RULES INVOLVED

The certiorari petition (p. 5) correctly lists the statutory provisions involved as being Sections 1 and 2, Sherman Antitrust Act (15 USCA 1, 2); Sections 4 and 6, Clayton Act (15 USCA 15, 17); Section 20, Clayton Act (29 USCA 52); Sections 2, 4 and 6, Norris-LaGuardia Act (29 USCA 102, 104 and 106); and the Labor Management Relations Act, 1947 [29 USCA 141, 151, 157 and 158(b) and (e)].[3] Also involved are Rules 52(a) and 61, Federal Rules of Civil Procedure.[4]

COUNTERSTATEMENT OF QUESTIONS PRESENTED

UMW does not accept the Statement of Questions Presented, as set forth in the Petition (p. 4). In lieu thereof, UMW submits the following:

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[3]These statutes are herein called *Sherman*, *Clayton*, *Norris-Laguardia* and *Taft-Hartley*, respectively, and are found in the certiorari petition in Appendix D, at pp. 115-28.

[4]Rules 52(a) and 61 are found in Appendix A to this brief.

1. Did the Sixth Circuit properly hold that the district court on remand was not bound by its previous statement that if it were trying the case under the preponderance of the evidence rule, it would conclude that UMW had impliedly entered a conspiracy and that such statement did not constitute the law of the case?

2. Did the Sixth Circuit and the district court, under applicable law and the evidence, properly hold that the Protective Wage Clause contained in the National Bituminous Coal Wage Agreement of 1950, As Amended Effective December 1, 1958, did not constitute a violation of the Sherman Act?

3. Was the Sixth Circuit's affirmance of the district court's dismissal of the antitrust claims proper under Rule 52(a), Federal Rules of Civil Procedure?

4. Did the Sixth Circuit properly approve the district court's refusal to receive in the record the additional exhibits and deposition tendered by Petitioners on their motion for opening the record for additional evidence?

COUNTERSTATEMENT OF THE CASE

A. LEGAL PRINCIPLES INVOLVED

The legal guidelines involved respecting liability of labor unions under the Sherman Act (15 USCA 1, 2) appear in the district court's *first Ramsey*,[5] which continue to be applicable herein, except as corrected by this Court's *first Ramsey* [*Ramsey, et al.* v. *UMWA*, 401 U.S. 302 (1971)].

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[5]*Ramsey, et al.* v. *The UMWA*, DC, E.D. Tenn., S.D., 1967, 265 F.Supp. 388.

1. The Standard Of Proof Enunciated In This Court's First Ramsey

Though *UMW* v. *Pennington*, 381 U.S. 657, held *Clayton's* Section 20 and *Norris-LaGuardia's* Section 4 "permitted a union, acting alone, to engage in the conduct therein specified without violating the Sherman Act" (pp. 661-62) and announced (p. 665) that forfeiture of a labor union's exemption from antitrust laws results only when it is clearly shown" the union has entered into an extra-unit agreement, this Court's *first Ramsey (Ramsey, et al* v. *UMWA*, 401 U.S. 302), in a 5-4 opinion, reversed the holdings of both the district court[6] and the affirming opinion of the Sixth Circuit[7] that the "clear proof" standard applies to an action wherein a labor organization is sought to be charged with a Sherman Act violation and held *Norris-LaGuardia's* Section 6's "clear proof" use limited to issues relating to "the Union's authorization, participation in or ratification of the acts allegedly performed on its behalf", but held the preponderance rule applicable to "factual issues concerning the commission vel non of acts by union officers or by members alleged to constitute a conspiracy, or the inferences to be drawn from such acts, or concerning overt acts in furtherance of the conspiracy, the impact on the relevant market or the injury to plaintiffs' businesses" (401 U.S. 309).

Stating the issues to be *whether UMW conspired "with various coal producers to drive" Petitioners "out of business" (401 U.S. 304)*, this Court's *first Ramsey* adhered to *first Pennington's* holding (381 U.S. 664) that there is no liability under the antitrust laws when a labor organization concludes "a wage agreement with a multi-em-

[6] *Ramsey, et al.* v. *The UMWA*, DC, E.D. Tenn. S.D., 1967, 265 F.Supp. 388.
[7] *Ramsey, et al.* v. *UMWA*, 6 Cir., 416 F.2d 655 (1969).

ployer bargaining unit . . and . . as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek(s) the same wages from other employers" (401 U.S. 312-13) and reaffirmed its holding in *Allen Bradley Co.* v. *Union*, 325 U.S. 797, that (401 U.S. 313):[8]

> "unilateral conduct by a union of the type protected by the Clayton and Norris-LaGuardia Acts does not violate the Sherman Act even though it may also restrain trade '[T]hese congressionally permitted union activities may restrain trade in and of themselves. There is no denying the fact that many of them do so, both directly and indirectly'. But 'the desirability of such an exemption of labor unions is a question for the determination of Congress' ".

B. KIND OF ACTION AND UMW'S DEFENSES

1. Kind Of Action

Petitioners are 18 coal producers in southeastern Tennessee[9] who sued the United Mine Workers of America (UMW), seeking damages for an alleged violation of Sections 1 and 2 of the Sherman Antitrust Act (15 USCA 1, 2). While the certiorari petition (p. 5) accurately recites that "This is the second appeal in these two cases, which were tried without a jury on the same record", the first appeal concerned only determination of the appropriate standard of proof required to prove a *Sherman* conspiracy.

As this Court's *first Ramsey* (401 U.S. 304) recites, Petitioners accused UMW of violating *Sherman* by conspiring with various coal producers to drive Petitioners

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[8]Unless otherwise indicated, all emphases are supplied.

[9]Petitioners herein (called "Petitioners" or "Companies", except as substituted and, further, as to Marshall Meeks (not a Petitioner herein) were Petitioners in this Court's No. 88, styled *Ramsey, et al., Petitioners* v. *UMWA*, decided February 24, 1971, and reported in 401 U.S. 302.

out of business by expressly or impliedly agreeing with "major producers to impose . . the National Bituminous Coal Wage Agreement (NBCWA), first executed by the Union and certain coal companies in 1950, on all coal mine operators, knowing that small and nonmechanized operators would be unable to meet the contract's terms", the alleged conspiracy's purpose being "to eliminate the marginal operators, control production, and reserve the market for larger concerns" (401 U.S. 304).

Petitioners claim, declared this Court's *first Ramsey*, of express agreement rested on the Protective Wage Clause (PWC) added to the National Agreement by amendment in 1958 and that a conspiratorial arrangement between UMW and major operators could be implied from PWC, the course of negotiations between the two from 1950 forward, the ensuing organizational and strike activity against Petitioners and other southeastern Tennessee operators aimed at securing agreement to and compliance with the National Agreement as amended from time to time, as well as UMW's purchase of a controlling interest in West Kentucky Coal Company and the latter's allegedly predatory pricing in the TVA coal market (401 U.S. 304-05).

Upon this Court's reversal and remand (*post*, p. 15), the district court's *second Ramsey* (*Ramsey, et al.* v. *UMWA*, DC, E.D. Tenn., S.D., 1972, 344 F.Supp. 1029) stated its duty was to "reconsider and reweigh each element of evidence", applying the appropriate standard enunciated in this Court's *first Ramsey* (Pet. 87; *ante*, p. 4).

2. UMW's Defenses

Summarized, UMW's contentions are: UMW denied the conspiracy charges. It asserted UMW is a labor

organization within *Clayton's* Section 6, that by virtue of *Clayton's* Sections 6 and 20 (15 USCA 17, 29 USCA 52) and the Norris-LaGuardia Act (29 USCA 101 *et seq.*), the negotiations and execution of agreements by UMW and its acts and conduct in connection with the enforcement thereof do not constitute a *Sherman* violation. It further asserted all agreements were obtained by its independent efforts, acting unilaterally and in its own self-interest, free of alliance or combination with any employer or groups of employers for a predatory, anticompetitive purpose and that its acts were motivated by legitimate labor goals to secure uniformity of labor standards of wages and working conditions for its members.

C. FIRST RAMSEY RULINGS

1. In First Ramsey The District Court Exonerated UMW Of Any Sherman Act Conspiracy

a. Evidence of matters other than PWC

The district court's *first Ramsey* exonerated UMW of any *Sherman* conspiracy in the 1950-58 period. Noting UMW's consistent policy and goals since 1890 to establish uniformity of wages and labor standards, its consistent opposition to wage-cutting to meet competition, and the *uncontradicted* denials of the conspiracy charge, the district court exonerated UMW from the conspiracy charge that the 1950 contract was conspiratorial, finding it was "negotiated under intense national interest, intense publicity, and intense supervision by and pressure from the Federal Government" (265 F.Supp. 406). It rejected Petitioners' contention that peaceful bargaining in the post-1950 period evidenced a conspiracy and refused to read a *Sherman* conspiracy into the UMW-BCOA (Bituminous Coal Operators Association) negotiations in negotiating and executing the 1950, 1952, 1955 and

1956 contracts, declaring (265 F.Supp. 408), "That these more peaceful procedures suggest a Sherman Act conspiracy . . is not reasonably to be inferred", and "A contrasting peaceful and orderly pattern of collective bargaining following a prior pattern of industrial warfare and strife does not become suspect nor serve as an evidentiary predicate for a Sherman Act conspiracy charge".

The district court refused to infer a conspiracy on the basis of the wage scale negotiated in 1950, avowing to do so engages "in unwarranted speculation" and disregards UMW's undeniable right, consistent with *first Pennington* not to "gear its wage demands to wages which the weakest unit in the industry can afford to pay" (265 F.Supp. 407).

Of economic pressures resultant from wage increases and mechanization, the district court declared (265 F. Supp. 409), "economic pressures created by technological advances and the competition engendered thereby do not equate to a Sherman Act violation. Upon the contrary, the Sherman Act is designed to keep the market open so that such competitive pressures may operate."

The district court's analysis led it to declare it unable "to infer" any *Sherman* conspiracy in the 1950-58 period (265 F.Supp. 410).[10]

Likewise, in *first Ramsey* the district court rejected evidence of events in southeastern Tennessee coal fields and pricing of coal upon the TVA market as proving a *Sherman* conspiracy (265 F.Supp. 412-34). Relevantly, the district court's conclusion, *viewing the evidence as a*

[10]Page references supporting the district court's *first Ramsey* findings are to be found in UMW's Opposition Brief to the Petition for Writ of Certiorari in this Court's No. 1179, October Term, 1969, in footnotes on pp. 6-7.

whole, was that Petitioners "woes and misfortunes" are explicable by many factors not demonstrative of a *Sherman* conspiracy (265 F.Supp. 434), which included pyramiding of leases with resulting increased royalty or rental payments, adverse geological conditions, undercapitalization with the resulting attempt to mine coal by antiquated methods in an era when not only coal but all fuel energy is produced on a mechanical and mass production basis (265 F.Supp. 434), management policies, the nature of the TVA coal market, lax practices and attitudes upon the workers' part and collective bargaining as practiced in the field (265 F.Supp. 424).

b. The district court validated PWC under the facts and the Sixth Circuit's ruling in first Pennington

The record establishes that PWC (Pet. 7-8) had its genesis in 1943 contract negotiations when UMW sought, and the National War Labor Board directed, that each agreement contain a clause to protect the contract and preserve the interests of the miners (935a).[1] It read: *"operators agree that they will not let any operating mines subject to this agreement as a subterfuge"* to avoid the Agreement's provisions (936a). A 1943 labor agreement, negotiated by the Secretary of the Interior and

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[1]The filed record includes 3 sets of appendices in the Sixth Circuit:

(1) 3 volumes of Plaintiffs-Appellants in Cases Nos. 17,878 and 17,879, references to which will be by page number followed by the letter "a", and a small printed volume entitled "Supplementary Appendix for Plaintiffs-Appellants", pages 1124-91a, followed by the page number.

(2) 3 volumes of Defendant-Appellee (UMW) and a typewritten "Defendant-Appellee's Supplemental Appendix", pages 1339-40b, reference to which will be by page numbers followed by the letter "b".

(3) 1 volume of proceedings in the district court *following the Supreme Court's remand*, reference to which will be made as "J.A." followed by the page number and the letter "a", except where the matters refer to the district court's *second Ramsey*, which references will be made to the appropriate page in the certiorari petition.

known as the Ickes-Lewis Agreement, contained an identical clause (938a). Subsequent agreements negotiated annually from 1943 through 1951 carried the anti-lease clause (938-39a).

The clause was expanded in the 1952 amendment to the 1950 Agreement when signatory operators agreed that:

> "operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this agreement" (940a).

This same language was carried forward in the 1955, 1956 and 1958 Agreements (935-41a).

For six years following the 1952 Agreement's execution, UMW believed signatory operators were "chiseling" on the contract (941a).

During negotiations for the 1958 Agreement, UMW proposed, and BCOA *rejected,* a protective wage clause. A revised proposal on November 25, 1958, accompanied a letter setting forth the clause's purpose and the reasons therefor: ". . . it has become mandatory that the union find a way in which to protect its members employed in the . . . industry against the ever-encroaching evils and practices of subcontracting, the production and procurement of coal not mined in accordance with the wage scales and other terms and conditions of the national agreement, and other companion evils flowing therefrom" (943a). Continuing, the letter recited: "Sub-

contracting by signatory operators is nothing more than pure evasion of their contractual obligation to pay and maintain the agreed standards of wages and . . . vitally affects our members because it progressively undermines our members' tenure of employment and results in removing and withdrawing from them more and more work and hence more and more jobs are lost to them" (943a). The letter charged, "many signatories of the present national agreement, indeed members of your own association, have been, and presently are, guilty of such nefarious practices", thereby becoming assisting parties "to those who seek to debase and lower our standard of wages, hours, safety requirements, work opportunities and other benefits" which UMW members are entitled to have protected (943a).

Agreement reached on PWC required coal mined, produced, prepared, procured or acquired by signatory operators shall be mined under labor standards as favorable to employees as those in UMW's contract (944a). UMW's John L. Lewis announced that labor standards and job opportunities to which UMW members are contractually entitled have been achieved after long years, and UMW seeks to safeguard these by PWC (945a). Reluctantly, BCOA agreed, to avoid an interruption in the supply of coal (947a).

Operators complained UMW was not enforcing contracts already signed among particular signatories, causing them to ask UMW for a reciprocal contractual commitment, and UMW's senior counsel testified that UMW acquiesced it would enforce the Agreement *as to all signatories thereto equally* (1029a).

There are *undisputed* positive denials that UMW entered into any agreement other than the collective bar-

gaining agreement (824a, 1029a). *Uncontradicted* evidence of UMW witnesses shows UMW free to negotiate a labor agreement at variance with the National Agreement (508a, 636-37a, 1034a). Consistent testimony of George H. Love for management (825a), denied there was any agreement on UMW's part to impose the negotiated agreement upon any other group of employers.

Consistent with the Sixth Circuit's *second Pennington* [*Lewis* v. *Pennington*, 6 Cir., 400 F.2d 806, 814 (1968)], the district court approved the legal principle that "Where two reasonable constructions of a written contract can be made, preference is given to that construction . . that does not result in a violation of law", citing *Great Northern Ry. Co.* v. *Delmar Co.*, 283 U.S. 686, 691, and *Perry Coal Co.* v. *NLRB*, 7 Cir., 284 F.2d 910, 914.

Though the district court's *first Ramsey* held that PWC did not constitute an express commitment by UMW to BCOA *"not to bargain with any other coal operator" upon terms other than the* National Agreement, it posed the quaere whether UMW "did in fact, though not expressly, so contract with" BCOA (265 F.Supp. 412). Implementing the standard of proof found in *Norris-LaGuardia's* Section 6 (29 USCA 106), the district court held *the record "does not establish such clear and unequivocal proof as to warrant the Court in finding"* UMW *"pursued its policy of uniformity of wage and labor standards by agreement with one or more employers, as distinguished from pursuing such policy on its own"* (265 F.Supp. 412). Further, it declared, *"The only direct evidence in the record is to the effect that the Union pursued such policy upon its own, and not in agreement with any employer"* (p. 412).

Of PWC's Paragraph B., the district court said it "has

to do with the obligation of the operators in regard to subcontracting and leasing", while PWC's subsequent paragraphs "have to do with the functioning of a joint industry contract committee in disposing of reported cases of violation" of PWC (p. 410).

PWC was not to become effective until April, 1959. It was never enforced (881a). Originally delayed by mechanics of setting up the Joint Industry Contract Committee (JICC), created by PWC, its activities were suspended on November 4, 1959 because of doubt concerning its legality under the Landrum-Griffin Act which barred "hot cargo" clauses (947-48a). PWC was specifically eliminated from the 1964 Agreement dated March 23, 1964 (477a, 493a, 1030a). JICC was dissolved March 31, 1964 (884a).

2. The Sixth Circuit Divided Evenly On The Standard Of Proof Required To Prove A Sherman Conspiracy

The district court's judgment was affirmed by an equally divided court, the affirming opinion agreeing with the trial court that *Norris-LaGuardia's* Section 6 required "clear proof", with the dissenting judges insisting that the ordinary preponderance of evidence standard was applicable in civil antitrust actions against labor unions [*Ramsey* v. *UMW*, 6 Cir., 416 F.2d 655 (1969)]. Notably, the dissent made clear that the dissenting judges "do not reach consideration of whether the District Judge's findings were 'clearly erroneous'. We hold only that the 'clear proof' standard which the Judge applied in making his findings was improper" (416 F.2d 670, fn. 3). The standard of proof to which *Norris-LaGuardia's* Section 6 did and did not apply has already been related (*ante*, p. 4).

3. This Court's First Ramsey

This Court's *first Ramsey* adhered to *first Pennington's* holding (381 U.S. 664) that there is no liability under the antitrust laws when a labor organization concludes "a wage agreement with a multi-employer bargaining unit . . and . . as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek(s) the same wages from other employers" (401 U.S. 312-13) and it reaffirmed its *Allen Bradley* holding (*ante*, p. 5), following which this Court declared

> "But neither do we retreat from the 'one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices . . A business monopoly is no less such because a union participates, and such participation is a violation of the Act'. Id., at 811 . . Hence we also adhere to the decision in Pennington: '[T]he relevant labor and antitrust policies compel us to conclude that *the alleged agreement* between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws'. 381 U.S. 669, . . Where a union, by agreement with one set of employers, insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed-upon conduct" (401 U.S. 313).

Additionally, this Court, urged to construe PWC as itself being an illegal bargain for which UMW is not exempt under *Sherman*, rejected Petitioners' position because it found "no reference to this aspect of the case in" opinions of the lower courts and deemed "it inappropriate to consider it in the first instance" (401 U.S. 312).

It reversed the Sixth Circuit's judgment and remanded "the case for further proceedings consistent with this opinion" (401 U.S. 314).

D. IN SECOND RAMSEY, APPLYING THE PREPONDERANCE RULE, THE DISTRICT COURT EXONERATED UMW OF ANY SHERMAN ACT CONSPIRACY

1. The District Court Denied Petitioners' Motion To Reopen

Petitioners moved, over UMW objections (J.A. 180-82a), to reopen the record for "Additional Evidence on the Issue of Liability", attaching JICC minutes under PWC and depositions of Joseph E. Moody, formerly Southern Coal Producers Association president and then president of BCOA (J.A. 19-179a). The District court denied the motion to reopen the proof, noting "The Court has read and considered all" of the proffered evidence and that, though voluminous, the additional proof "is in very substantial measure cumulative to the proof offered upon the trial" and "offers no new theories of liability" and "no significant alteration of the evidence as presented upon the trial" (J.A. 200a).

2. The District Court's Second Ramsey Opinion and Judgment

Noting it made "a full review of the record upon the trial of the case, . . re-studied the original trial briefs", "read and considered the evidence submitted upon" Petitioners' "offer of proof in support of their motion to reopen", the district court declared "nothing in this re-study of the record has revealed . . any error in the statement of proven facts . . in its former opinion in 265 F.Supp. 388" and that "the Court remains of the view that the facts, other than those to be inferred, and other than as may be supplemented herein, are correctly set forth in its former opinion" (Pet. 85). It therefore

adopted its former opinion "except as it may be expressly corrected or supplemented in this opinion" (Pet. 85) and, on June 30, 1972, by final judgment, denied Petitioners' motion to be allowed to reopen the proof and dismissed the "causes of action alleged" under *Sherman* and *Clayton* "with prejudice" but with costs against Petitioners (J.A. 204-05a).

Subsequently, the district court denied Petitioners' motion to clarify findings of fact and conclusions that PWC is illegal under UMW's construction of PWC's Paragraph A, to which UMW had objected (J.A. 209a).

a. The district court's second Ramsey concluded that its first Ramsey findings were correct, even under the preponderance rule.

Under the preponderance rule, *second Ramsey*, as in *first Ramsey*, exonerated UMW from any conspiratorial conduct in the 1950-58 period (*ante*, pp. 7-9). Likewise, under the preponderance rule and treating the evidence as a whole, *second Ramsey* sanctioned *first Ramsey's* conclusion with reference to activities in the southeastern Tennessee coal field and the pricing of coal on the TVA market (Pet. 95-96). *Second Ramsey's* finalizing paragraph reads:

> "There is an absence of direct evidence of a conspiracy in this case"

and

> "For the reasons stated in this and its former opinion, the Court is of the opinion that there is an insufficiency of indirect evidence to establish a conspiracy, even when viewed in light of the preponderance of the evidence rule" (Pet. 102).

b. The district court's second Ramsey validated PWC's language.

In light of directions given upon the Supreme Court's remand, the district court declared it "appropriate to

consider further" that portion of its former opinion dealing with PWC. With regard thereto, the district court believed "These matters were carefully considered" and noted its conclusion that PWC "was limited to signatories only and did not commit or limit the Union in its bargaining with non-signatory coal operators"; and pointed out its conclusion had the Sixth Circuit's sanction in *first Ramsey*, 416 F.2d 655, 657 (Pet. 90).

Rejecting Petitioners' "new theory" concerning PWC, namely that PWC would by its express terms limit UMW in its future negotiations with all previous signatories of the National Agreement, thereby removing its exemption from the antitrust laws as a labor union, at least as to previous signatories and that PWC constituted an express commitment violative of the antitrust laws, the district court declared that "PWC refers neither to future previous signatories, but rather to 'signatory operators' and to 'employees covered by this contract' " and that Petitioners' contention "would appear to be partially self-defeating in that most, if not all, of the [Petitioners] were themselves parties to that Agreement until December of 1962" (Pet. 90-91). As in *first Ramsey*, the district court concluded that "PWC did not constitute an express commitment" by UMW "to bargain with other coal operators only upon terms set forth in the contract made with" BCOA (Pet. 91).

c. The district court's second Ramsey, under the preponderance rule, rejected the contention of an implied agreement.

As in *first Ramsey* (265 F.Supp. 432), *second Ramsey* declared "there is no direct evidence in the record of a conspiratorial agreement between UMW and the BCOA", noting denials by every officer and representative of UMW and of BCOA who testified at the trial (Pet. 93-

94). Pointing to the "newly offered" testimony, *second Ramsey* found *"Even Mr. Moody, who as President of the Southern Coal Operators Association from 1946 to 1950 represented competitors of the BCOA in negotiations with the UMW, vehemently denies any such conspiracy"* (Pet. 93-94).[12]

Second Ramsey undertook to determine from *inferences* to be drawn from PWC, as well as when considering the record as a whole, whether PWC "by implication" did what it did not expressly do (Pet. 97).

Explaining its *first Ramsey* dictum of an implied agreement under the preponderance rule, because motivated by UMW's adherence to its National Contract, the competitive motive of BCOA members, and operator complaints to UMW of nonsignatory advantage, *second Ramsey* stated: (1) "It appears that national uniformity in wage rates and labor standards in the coal industry has been a consistent" UMW policy and goal "since its inception in 1890" (265 F.Supp. 404; Pet. 98); (2) BCOA and its members had a competitive motive and "it is apparent that in a competitive economy a competitive motive will be universal to all coal producers" and "To draw an inference of antitrust conspiracy from this motive would be somewhat of an anomaly" (Pet. 98); and (3) concerning inferences from signatories' registering of complaints of competitive disadvantage with UMW, they "were universal in their origin and included the plaintiffs themselves" and, declared the district court, "Perhaps one operator best summed up the attitudes of all operators when at a bargaining session he stated: *'All I want is a fair advantage'* " (Pet. 98).

[12]The foregoing district court findings challenge Petitioners' statement in their Appendix C (p. 104) that the district court's findings do not touch "upon in any shape or form" the Moody testimony.

Then, observing that "inferences to be drawn from the PWC are as consistent with unilateral action as they are with conspiratorial action", *second Ramsey* noted this would "leave the Court to speculate in making the choice" and that "Where equal inferences can be drawn and the Court is left to speculate, the plaintiffs have failed to carry their burden of proof", citing *South East Coal Co.* v. *Consolidation Coal Co.*, 6 Cir., 434 F.2d 767 (1970) [Pet. 98-99].

d. The JICC minutes and the Moody deposition conclusively support the district court's findings

Since Petitioners stress that the documentary evidence attached to its motion to reopen the record proved conclusively an implicit deal made by UMW and the circumstances and intentions of the parties in writing PWC into the National Agreement in 1958, as well as the practical construction given PWC by individuals who drafted it in their activities as JICC members (Pet. 12), a summary of such evidence follows:[13]

The JICC Minutes

A detail of the JICC minutes discloses: At the meeting on January 21, 1959, Union members were John L. Lewis, Thomas Kennedy and John Owens; while operator members were Hamilton K. Beebe, Edward G. Fox and Joseph E. Moody, representing BCOA, Southern Coal Producers Association, Illinois Coal Operators Association, Indiana Coal Operators Association, Indiana Coal Producers Association and Western Kentucky Coal Producers Asso-

[13]Petitioners' Appendix C contains not only the JICC Minutes and the Moody Deposition, but also other material, including argumentative matters. As already noted *ante*, p.), contrary to Petitioners' statement (Pet. 104) that the Moody testimony is "not touched upon in any shape or form in the District Court's findings" is its finding that "Even Mr. Moody . . vehemently denies any such conspiracy" (Pet. 93-94).

ciation (J.A. 22a, 43-44a); and that Lewis was chosen chairman and Beebe, secretary pro tem (J.A. 22a). The Committee's adopted form of operator compliance reads (J.A. 45a):

> "1) This Company is in full compliance with all of the provisions of the Protective Wage Clause of the said National Bituminous Coal Wage Agreement of 1950, as amended;
>
> "2) Each employee of this company covered by the National Agreement is receiving the full wages due him under the terms of the said agreement;
>
> "3) This Company is paying to the UMWA Welfare and Retirement Fund the full 40¢ payment required by the National Agreement to be paid on each ton of coal produced for use or for sale by this company, and
>
> "4) That the Company has complied fully with all other provisions of the said National Agreement"

while the adopted union certification form reads (J.A. 46a):

> "In accordance with the provisions of Paragraph D of the Protective Wage Clause of the National Bituminous Coal Wage Agreement of 1950, as amended effective December 1, 1958, I, _____, President of District _____, International Union, United Mine Workers of America, do hereby certify that as of _____, 1959 the following is a complete list of all Operators and Mines engaged in the production of bituminous coal within District _____ and whose operations are under contract to the said union:"

February 26, 1959 minutes disclose UMW's willingness to request each union district president to file with the

Committee a certified list of operators and mines engaged in bituminous coal production within his district *"whose operations are under contract with the Union"* was adopted and the Committee's executive director was instructed "to inform any signatory making request therefor as to whether or not a specified operator or mine was so listed," but "complete lists were not to be made available to any signatory" (J.A. 48-49a).

At the April 14, 1959 meeting, the executive director reported operator certification forms had been mailed to 3,228 signatories of which 745 forms had been returned, and forms were mailed to 192 names received from UMW (J.A. 52a). The Committee ordered expansion of the operator's certification form to include the signatory's address, the union district or districts in which the mines are located, and the local association, if any, of which the signatory is a member (J.A. 53a). At the meeting "procedures to be followed in the processing of complaints alleging violations of" PWC were adopted (J.A. 54a), which provided the director refer all complaints to counsel for an initial screening "as to whether the subject matter thereof is properly within the scope of" PWC and "to secure Counsel's recommendations as to the further processing of complaints by way of dismissal, further investigation, etc." (J.A. 55a).

The Committee instructed its director on May 20, 1959, to send to approximately 2,000 operators a letter (J.A. 61-62a) that failure to file certification of compliance with terms and conditions of the 1958 Agreement constituted "a prima facie violation of" PWC, that since PWC required notice of any alleged violation, the letter "provides you with such notice and opportunity which, under the Clause, is a condition precedent to any final determination that a violation has occurred" and that

"prompt filing of the required certification will terminate this particular matter".

The director, at JICC's meeting on June 24, 1959, presented a list of 455 operators who had failed to file the certification form that each was in full compliance with the Agreement's terms (J.A. 63a).

Subsequent meetings of JICC dealt with signatories who had failed and refused to comply with its obligation *"to certify in writing to the committee that it is in full compliance with all of the terms and conditions of such agreement"* (J.A. 68-77a). At the November 4, 1959 meeting, "The members of the Committee then discussed the status of the Committee with reference to the recently enacted Landrum-Griffin Bill"; and because of uncertainties and other factors derivative from that Bill, the Committee suspended further proceedings and the administration and enforcement of PWC pending appropriate clarification and interpretation of the sundry problems until May 1960 (J.A. 78-80a). At the March 31, 1964 meeting, it was reported that PWC had been deleted from the National Agreement effective April 2, 1964 and "accordingly the basic authority for the existence of" JICC "would terminate as of that date"; and the Committee proceeded to dissolve itself (J.A. 95a).

The Moody Deposition

Joseph E. Moody was president of Southern Coal Producers Association (SCPA)—a group of operators in Tennessee, Kentucky, Virginia and West Virginia "primarily for the administration and negotiation of contracts" in the bituminous coal industry—from 1946 until 1960 (J.A. 100-01a).

Though SCPA minutes profess "industry-wide bargaining impractical and undesirable from the standpoint of the Southern Operators; and in their judgment not beneficial to the country itself" (J.A. 102a), nonetheless Moody admitted "there was an inconsistency" by demanding entrance into some negotiations (J.A. 103a), noting in particular SCPA's request to join Northern operators in the 1949 negotiations (J.A. 104a). Moody noted that conditions are different among Southern operators and there are labor problems peculiar to southern fields (J.A. 110a).

Moody admitted that, following BCOA's formation, he was kept advised concerning contract negotiations and that "if we had at any time been cognizant of what we thought was an illegal—cutting us out or keeping us away by agreement, we would have raised the devil from here to West Virginia and back again" (J.A. 112-13a). Indeed, Moody attributed good faith bargaining to UMW's Lewis of the 1952 Agreement (J.A. 114-16a).

Though Moody testified SCPA complained bitterly to UMW's Lewis of non-contract operations and of UMW's failure to organize such operations (J.A. 123-25a), when asked if PWC resulted from these conversations with Lewis (J.A. 147a), Moody's reply was *"I don't know that"* (J.A. 148a).

Moody recalled talking with Lewis who showed him "two papers which purported to be what we later called a protective wage clause—in other words a protection of the contract operators"—one prepared by UMW's Hopkins and the other by BCOA's Fox, the basic approach of each being "to work out some method of closer cooperation by contract operators" (J.A. 149a). These instruments were taken by Moody to his attorneys and,

as Moody stated, "we brought them back and the protective wage clause that was put into the contract was pretty much what was written in" SCPA attorney's law office (J.A. 150a). Moody's approval of PWC was because it "would give us a participation in the overall administration of the contract and also an effective way of bolstering the contract" and "protect against the substandard coal" he had discussed (J.A. 154-55a).

On cross examination, when asked "Did you know of any conspiracy between" the BCOA and the union "in connection with the northern operators and the union's negotiations in contracts with them" at any time "during your term as president of the Southern Coal Producers?", Moody replied, "If I had even heard the word '*conspiracy*' or had an idea that anybody was even thinking in such terms I can assure you they would have been able to hear me all the way from Chicago down to Dingus Run and back again", and further

> "I also know that with the counsel that I have, John Gall and John Lane and the rest of them, that *if we had had the slightest idea of such a thing twenty years ago* we sure would have been riding high, because *we would have taken them apart one little piece at a time.* It never occurred to anybody at that time. We were too desperately trying to keep this industry alive. Now, it was hard. They gave no quarter and they asked no quarter. But it was tough times in our industry" (J.A. 175-76a).

E. THE SIXTH CIRCUIT'S SECOND RAMSEY RULINGS

The certiorari petition (p. 13) accurately notes that on second appeal a Sixth Circuit three-judge panel split 2-1 to sustain the trial court's action following the mandate. It omits, however, that Petitioners' rehearing *en*

banc motion was denied on August 20, 1973, "No active judge on the court having proposed rehearing in banc."[14]

The Sixth Circuit's majority rejected Petitioners' claim that the district court's *first Ramsey* statement that "if he were trying the case under the preponderance of the evidence rule, he would conclude that the UMW had impliedly entered a conspiracy" constituted the law of the case, holding "the comment was dictum and appropriately subject to the District Judge's reconsideration on the total record when the case had been remanded to him" (Pet. 45-47; 83 LRRM 2548).

The majority agreed with the district court's rejection of Petitioners' contention that PWC constituted a per se violation of the antitrust laws, noting the Sixth Circuit's approval of PWC in its *first Ramsey* (416 F.2d 657), as well as its sanction of PWC in *Lewis* v. *Pennington*, 400 F.2d 806, 814 (Pet. 61-63; 83 LRRM 2553-54). Likewise the majority sanctioned the district court rejection of Petitioners' new theory upon remand, namely that PWC would by its express terms limit UMW in its future negotiations with all National Agreement signatories, thereby removing its exemption from the antitrust laws as a labor union, at least as to previous signatories. The majority also sanctioned the district court's response that "PWC refers neither to future previous signatories" —such as Petitioners—"but rather refers to 'signatory operators' and to 'employees covered by this contract' ", and therefore "PWC did not constitute an express commitment" upon UMW's part to bargain with other coal operators only upon terms set forth in UMW's contract with BCOA. Further, the majority's agreement included

[14]Circuit Judge Weick would have granted the rehearing petition and reversed the district court's judgment for reasons assigned in the dissent (Pet. 63-82; 83 LRRM 2554-61).

the district court's declaration that "nothing in the new evidence tendered in support of plaintiffs' motion to reopen . . . would tend to alter this construction" of PWC's terms (Pet. 62; 83 LRRM 2553-54).

The majority held "the District Judge's findings of fact are supported by substantial evidence and are not clearly erroneous" (Pet. 56; 83 LRRM 2551).

Noting the district court "clearly read and considered all of the material which plaintiffs desired to present", observing that *"At oral argument counsel for plaintiffs on a direct question from the court informed us that if the case were remanded to the District Court, plaintiffs would have no further evidence to offer"* (Pet. 57; 83 LRRM 2552) and, further, acknowledging that "we too have reviewed the evidence" (Pet. 59; 83 LRRM 2552), the majority affirmed the district court's decision denying the motion to reopen the record for presentation of additional evidence. "In the alternative", the majority declared, "if this were held to be error, *we would also hold that on the totality of evidence in this record (including consideration of the proffered evidence), such error was harmless", pointing to Federal Rules of Civil Procedure, Rule 61* (Pet. 59; 83 LRRM 2553).

ARGUMENT

I. THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED

A. Contrary To Petitioners, The Sixth Circuit Majority And The District Court Alike Complied With This Court's Remand In *First Ramsey*

Petitioners argue (Pet. 14) that the lower courts misconstrued and rejected this Court's instructions in *first Ramsey*, asserting that this Court's mandate required a new trial upon remand—rather than a review of the

"old record"—with respect to an implied conspiracy to standardize employment terms throughout the industry aimed at destroying marginal producers based upon district court's comment in *first Ramsey* that "were this case being tried upon the usual preponderance of the evidence rule applicable to civil cases, the Court would conclude that the UMW did so impliedly agree."

However, in this Court's *first Ramsey*, Petitioners sought reversal and remand "with directions that UMW be adjudged in violation of" *Sherman* and a new trial granted "for the determination of damages . . . or, in the alternative, that" Petitioners "be granted a new trial",[15] but this Court's reversal was premised upon an erroneous standard of proof, and it remanded the case for further proceedings (401 U.S. 314), consistent with its opinion which included the statement in its Footnote 5 (p. 308) that

> *"To what extent the proof would fail under the standard we here hold applicable and what legal difference it might make are matters open to be dealt with on remand."*

The Sixth Circuit's majority appropriately noted the quoted language in its assessment that this Court "clearly did not view the *first Ramsey* preponderance of evidence comment by the District Judge as 'the law of the case' as [Petitioners] now contend" (Pet. 46; 83 LRRM 2548).

Relevantly and responsive to the dissent (Pet. 64-65; 83 LRRM 2554-55), pressed by Petitioners (Pet. 14-18), and to the dissent's argument that this Court's *first Ramsey* "did not confine the District Court to consideration of only the old record", the Sixth Circuit's majority noted, "We have no doubt that if the Supreme Court had

[15]See Petitioners' main brief in this Court, p. 92, in Case No. 88, October Term, 1970.

intended remand *for new trial*, it would surely have said so"; the majority also noted that the Sixth Circuit's remand "did not order" a retrial "of this lengthy and bitterly disputed litigation" (Pet. 60; 83 LRRM 2553); and of the dissent's citation of *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 540 (1958), the majority responded that in *Blue Ridge* the appellate court was directed to "remand the case to the District Court *for a new trial*". Cogent, too, is the majority's observation that "we find nothing in appellants' motion before the District Court, nor in their brief in this court, which either seeks or claims a right to a new trial" (Pet. 60; 83 LRRM 2553). *The certiorari petition contains no challenge of the majority's statement.*

B. The Sixth Circuit Majority Correctly Held That The District Court's *First Ramsey* Statement Concerning The Preponderance Rule Did Not Constitute The Law Of The Case

As noted (*ante*, p. 18), the district court characterized *as dictum* (Pet. 97) its statement "Were this case being tried upon the usual preponderance of the evidence rule . . . the Court would conclude that" UMW "did so impliedly agree" (265 F. Supp. 412) and noted, significantly, the conclusion was made *"when the Court was in fact weighing the evidence under the clear proof rule and not under the preponderance rule"* (Pet. 92).

Relevantly and inconsistent with its *dictum statement* is *first Ramsey's* conclusion that *"The only direct evidence in the record is to the effect that the Union pursued such policy upon its own, and not in agreement with any employer"* (265 F. Supp. 412) and *"All of the direct evidence in the record expressly denies the plaintiff's contentions of a conspiracy"* and that *"Every officer of*

the Union who testified, as well as every representative from the coal industry alleged to be in on the conspiracy, denied its existence" (p. 432), *which emphasizes the validity of characterizing its statement as dictum.*

Supportive of the majority's holding concerning the law of the case, in addition to this Court's quoted langauge (*ante*, p. 27), is Circuit Judge O'Sullivan's dissent adopted by this Court that *"we should make it clear that we need not and do not reach consideration of whether the District Judge's findings were 'clearly erroneous'. We hold only that the 'clear proof' standard which the Judge applied in making his findings* was improper" (416 F.2d 670, fn. 3)."

In light of this Court's *first Ramsey* language concerning the extent the evidence would fail under the "standard we here hold applicable and what legal difference it might make are matters open to be dealt with on remand" (401 U.S. 308, fn. 5), *Banco Nacional de Cuba* v. *Farr*, 2 Cir., 383 F.2d 166, 177 (1967), declared that the law of the case *"does not apply to matters left open by the mandate"*. Accord: "A judgment of reversal is not necessarily an adjudication by an appellate court of any question other than those which were in terms discussed and decided". 5 Am. Jur. 2d, *Appeal and Error*, §955. Indeed, *Barney* v. *Winona etc. R. R. Co.*, 117 U.S. 228, declares the rule under scrutiny does not apply to expressions of opinion on matters the disposition of which was not necessary to the decision; but, as stated in 5 Am. Jur. 2d, *Appeal and Error*, §753, pp. 196-7, the law of the case doctrine does not apply *"to mere dictum"*.

C. The Sixth Circuit Majority Correctly Held That The District Court's Findings Of Fact Exonerating UMW Of A Sherman Conspiracy Are Supported By Substantial Evidence And Are Not Clearly Erroneous

Neither the certiorari petition nor the Sixth Circuit's dissent complains of the majority's exoneration of UMW of any *Sherman* conspiracy antedating the 1958 Agreement.[16] Similarly, there is no challenge to the majority's approval of the district court's *first Ramsey* holding that Petitioners' "woes and misfortunes" are explained by factors not demonstrative of a *Sherman* conspiracy (*ante*, pp. 8-9), which is unequivocally responsive to Petitioners' quotations (Pet. 22-23) from the district court's *first Ramsey* pertaining to the disadvantages of producers in the southern Tennessee coal field. Petitioners instead complain of the majority's ruling of PWC and an alleged implicit agreement with major coal associations that allegedly put UMW in a straightjacket in its bargaining policy in dealing with Petitioners.

UMW's struggle to protect the work opportunities and labor standards achieved by UMW through processes of collective bargaining have been detailed (*ante*, pp. 9-12). Significantly, Petitioners avoid any reference thereto, as well as to the judicial approbation accorded PWC's validity under Section 8(e), Labor Management Relations Act, 1947, as amended. *Lewis, et al.* v. *NLRB*, D.C. Cir., 350 F.2d 801; *W. A. Boyle, et al.*, 179 NLRB 479. Where an agreement accords with Section 8(e), "it would be unreasonable to hold that success in securing such an agreement constitutes a violation of the antitrust laws". *Suburban Tile Center, Inc.* v. *Rockford Bldg. and Construction Trades Council*, 7 Cir., 354 F.2d 1, 3, cert. denied 384 U.S. 960, 385 U.S. 490.

[16] Evidentiary support of the district court's exoneration of UMW of a conspiracy prior to the 1958 Agreement appears *ante*, pp. 7-9.

1. The Sixth Circuit majority properly validated PWC's language and rejected Petitioners' "New Theory"

Federal authorities reflect judicial disinclination to condemn labor agreements as illegal *per se*.[17]

First and *second Ramsey* in both the district court and the Sixth Circuit concluded PWC *"was limited to signatories only and did not commit or limit the Union in its bargaining with non-signatory coal operators"* (*ante*, pp. 17, 25); noted "the law is well settled . . . that where two constructions of a written contract are reasonably possible, preference must be given to that one which does not result in a violation of law"; implementing that rule, concluded that PWC did not by its terms forfeit the Union's exemption from the antitrust laws (*ante*, p. 25); appropriately noted its conclusion of limitation to signatories was approved in *first Ramsey* (416 F.2d 657) and in *Lewis* v. *Pennington* (6 Cir., 400 F.2d 806, 814), as well as Judge Taylor's conclusion in *Lewis* v. *Pennington* (257 F.Supp. 815, 862; 83 LRRM 2553-54).

The majority's rejection of Petitioners' "new theory" that, at least as to previous signatories, PWC constituted an express commitment violative of the antitrust laws on the ground that "PWC refers neither to future previous signatories, but rather to 'signatory operators' and to 'employees covered by this contract' " (*ante*, p. 25), is a target for Petitioners' complaint and is premised upon language in the Supreme Court's *Ramsey* reading (401 U.S. 313):

> "Where a union, by agreement with one set of employers, insists on maintaining in other bar-

[17] *NLRB* v. *News Syndicate Co.*, 365 U.S. 695, 699, declared the Court "will not assume that unions and employers will violate the federal law" and that the illegal-per-se doctrine is available only where the contract explicitly calls for illegal conduct. See also *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667, 676; *Adams Dairy Co.* v. *St. Louis Dairy Co.*, 8 Cir., 260 F.2d 46; *NLRB* v. *McGahey*, 5 Cir., 233 F.2d 406.

> gaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed-upon conduct."

Petitioners' interpretation of the quoted language is that UMW violates *Sherman* if it "maintains" in any signatory unit wage terms destructive to that unit by agreement with another set of employers or association of employers (Pet. 33).

UMW challenges Petitioners' interpretation and asserts it becomes obvious in reading the quoted language that Petitioners isolate the employed wording *in total disregard of other relevant Ramsey language* and, particularly *the Supreme Court's refusal of Petitioners' invitation to "reconsider" its "holding in Pennington and other cases that under the Clayton and Norris-LaGuardia Acts the Union incurs no liability under the antitrust laws when it concludes 'a wage agreement* with the multi-employer bargaining unit . . . and . . . as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek[s] the same wages from other employers' " (401 U.S. 312-13).

Petitioners ignore that the quoted language is but explicatory of *Ramsey's* antecedent statement, quoted from *Pennington* (381 U.S. 669), that "the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws" (401 U.S. 313); and examination of *Pennington* demonstrates its "alleged agreement" statement was concerned with the anti-competitive interest of employers "rather than an interest in regulating [their] own labor relations" (381 U.S. 667-68).

Petitioners' interpretation is incongruous with the this Court's approval in *Ramsey* of *Allen Bradley*

(325 U.S. 809, 811) which itself recognizes that a labor agreement *"standing alone", "would not have violated" Sherman* and that "unilateral conduct by a union of the type protected by the Clayton and Norris-LaGuardia Acts does not violate" *Sherman* "even though it may also restrain trade" (401 U.S. 313), but to equate anti-competitive motivation with *Ramsey's* phrase, "ruinous to the business of those employers", is in opposition to this Court's *Ramsey's* refusal to reconsider its holdings in *Pennington* and other cases concerning union liability under the antitrust laws (401 U.S. 313), particularly *concerning unilateral action* and *Pennington's* holding, "The union need not gear its wage demand to wages which the weakest units in the industry can afford to pay" (*ante*, p. 14; 381 U.S. 665, fn. 2).

The majority correctly appraises PWC as not constituting an express commitment upon UMW's part to bargain with other coal operators only upon terms in the contract made with BCOA (Pet. 62).[16]

2. Second Ramsey correctly held the evidence failed to establish an implied agreement

Petitioners rely upon "new evidence" of circumstances surrounding PWC's origin, the practical construction thereof by JICC offered in minutes of SCPA and of JICC, and Joseph E. Moody depositions (Pet. 14-18), detailed *ante*, pp. 19, 22. This "new evidence" *and other uncontradicted evidence* dissipate the validity of Petitioners' contentions.

A detail of JICC minutes appears *ante*, p. 19. Nothing therein supports Petitioners' contention that

[16]Judge Weick's dissent on this issue, heavily relied upon by Petitioners (Pet. 23-26), has been rejected in *Lewis* v. *Pennington*, 6 Cir., 400 F.2d 806 (1968) and *Ramsey* v. *UMWA*, 6 Cir., 416 F.2d 655 (1969).

signatories intended, and UMW agreed, by PWC's terms, to impose the National Agreement's terms upon non-signatories.

Examination of the details discloses that violations charged and found had to do with a signatory operator's failure to fulfill his contractual obligation to file the Operators Certification Forms (*ante*, pp. 21-22); some signatories "had refused" Committee mailings, and a few "stated they were unable to comply" (J.A. 68a). Committee determinations that "each of the said operators is in violation of" PWC related to failure to comply. Note the Committee's language that "each and every Listed Signatory has violated" PWC, in that each "failed and refused to comply with its obligation" under such clause "to certify in writing to the Committee that it is in full compliance with all of the terms and conditions of such Agreement" (J.A. 64a).

While JICC minutes reveal complaints and rumors concerning three operators, all signatories to the 1958 Agreement, one was reported by the Committee's director to be in compliance and one was delinquent in its royalty payments to the Fund and arrangements had been made to discharge the obligation (J.A. 72a, 74a).

Actually, the minutes' demonstration of the Committee's act of suspending activities because of the uncertainties of PWC's validity (*ante*, p. 22), occasioned by Congress' enactment of *Taft-Hartley's* Section 8(e), reflects the Committee's desire to act in accord with, and not in violation of, law. It proves, as stated in *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71, 78, not only that "The whole contract shows respect for the law" rather than "defiance of it", but the Committee "proposed to go as far" as the law allowed them to go, which "is

their right; and they proposed to go no farther, and that is their whole duty" (pp. 78-79).

Similarly, Moody's testimony is detailed (*ante*, pp. 22-24). Petitioners' statement (Pet. 106) that "each time BCOA negotiated a contract amendment with UMW the same terms were imposed upon" SCPA "who could do nothing but sign" is countered by *undisputed* evidence that historically SCPA generally refused to bargain with UMW in joint sessions with Northern operators. *First Ramsey's* record establishes that while UMW sought to negotiate jointly with Northern and Southern operators, the latter group never remained in a joint conference (596-97a, 600a, 603-04a, 897-99a, 986-87a), except in 1945 (601a). Additionally, in 1950, SCPA insisted UMW bargain *separately* with it; but the Federal District Court in the District of Columbia advised SCPA counsel that all parties were to negotiate jointly (956a, 616a).

Moody's concern that Southern operators' conditions differ from those of Northern operators invites this Court's recall of *first Ramsey's* holding that "*Neither the nature of the competition, the coal seam characteristics, the comparative adaptability to mechanization, nor other factors enhancing the problems of marginal coal producers can compel wage differentials nor form a basis for a court altering the legislatively permissible labor policy of national wage uniformity*" (265 F.Supp. 408), which was included in findings and conclusions approved in *second Ramsey* (Pet. 95).

3. The Sixth Circuit's holding that the district court's second Ramsey findings of fact are supported by substantial evidence and are not clearly erroneous are warranted under applicable law and the preponderance of evidence

Pointing to an appellate court's requirement under

Rule 52(a), Federal Rules of Civil Procedure, "to give great weight to the findings of the trial court" and noting the testimonial record identical with *first Ramsey* (Pet. 47) and that in the Sixth Circuit's *first Ramsey* it had affirmed the district court by an equally divided vote and that the district court in *second Ramsey* "reviewed these findings of fact under the preponderance of evidence rule and reaffirmed them", the Sixth Circuit majority declared "On review of this lengthy record on remand and second appeal, we again hold that the District Judge's findings of fact are supported by substantial evidence and are not clearly erroneous"; and though conceding "the record in this case is one where the factual issues are close", the majority declared, "The basic decisions . . are for the finder of fact, whether that be a judge or a jury", declaring that to be the lesson of this Court in *first Ramsey* as well as *Lewis* v. *Pennington*, DC, E.D. Tenn., 1966, 257 F.Supp. 815, aff'd, 6 Cir., 400 F.2d 806 (1968), cert. denied sub nom, *Pennington* v. *UMW*, 393 U.S. 983 (1968), rehearing denied, 393 U.S. 1045 (1969) [Pet. 56].[19]

In light of undisputed evidence herein discussed and the total absence of any contradictory evidence in the certiorari petition, it is settled law, *applicable in antitrust cases*, that insofar as a conclusion is based on inferences drawn from documents or undisputed facts, Rule 52(a), Federal Rules of Civil Procedure, is applicable and such findings of fact are not to be set aside unless clearly erroneous. *U. S.* v. *Gypsum Co.*, 333 U.S. 364, 394.

Petitioners' criticism of the majority's adoption of the "clearly erroneous" rule is its application to evidence presented "largely from depositions, documents and

[19]The dissent, per Circuit Judge Weick, is the subject of the instant certiorari petition.

recorded prior testimony" to the district court in *first Ramsey* in 1965 and to the dissent's characterization thereof as "essentially a *'paper case'* where the clearly erroneous test of rule 52(a)" is inapplicable, citing *U. S.* v. *General Motors Corp.*, 384 U.S. 127, 141 (1966) and the Sixth Circuit's *In re*: *Clemens*, 472 F.2d 939, 941, n. 1 (1972) [Pet. 30-31].

However, contrary to the "paper case" characterization, actually 10 persons appeared as live witnesses testifying before Judge Wilson. Additionally, the evidence also included testimony, admitted by stipulation of the parties in the instant case, of live witnesses in *first Pennington*, and in *second Pennington* District Judge Robert L. Taylor, the presiding jurist in both cases, recognized their credibility in exonerating UMW of the alleged antitrust conspiracy (*Lewis* v. *Pennington*, DC, E.D. Tenn., N.D., 1966, 257 F.Supp. 815). Thus, the instant case posed a totally different situation from the *General Motors* case which recites that "of the 38 witnesses who gave testimony, only *three* appeared in person" (p. 142, fn. 16). Totally dissimilar, too, is *Clemens* wherein a bankruptcy referee, having heard the testimony, withdrew before the case was decided on the merits; a different referee made findings and conclusions on the basis of testimony in the transcript; describing the transcript as a "bare transcript unaided by observation of the demeanor of the witnesses", the Sixth Circuit observed, "this Court is not required to give special deference to the" referee's findings. A further distinction is that in *Clemens* the district court disapproved the practice.

D. The Sixth Circuit Majority Properly Approved The District Court's Refusal To Admit In Evidence Petitioners' Proffered Exhibits And Depositions

Petitioners complain (Pet. 14-18) of the majority's

approval of the district court's refusal to reopen the record to admit into evidence the JICC minutes and the Moody deposition, and assert their reliance upon the Beebe and the Moody testimony (Pet. 104-114). However, as the record shows and the majority opinion notes (Pet. 57), the district court noted it had "carefully read and considered the evidence submitted upon the plaintiffs' offer of proof in support of their motion to reopen the evidence" (Pet. 85), that "nothing in the new evidence tendered in support of the plaintiffs' motion to reopen the proof would tend to alter [its] construction of" PWC's terms (Pet. 91) and, further, "The newly offered evidence offers no new theories of liability and presents no significant alteration of the evidence as presented upon the trial" (Pet. 99).

The proffered evidence, as UMW has shown, not only did not establish PWC's invalidity or that UMW placed itself in a "straitjacket status" (*ante*, p. 25); but, to the contrary, it included as *second Ramsey* found, "*Even Mr. Moody, who as President of the Southern Coal Producers Association from 1946 to 1960 represented competitors of the BCOA in negotiations with UMW, vehemently denies any such conspiracy*" (Pet. 40, 93-94).

Petitioners concede they have no further evidence to offer

As the majority noted, "At oral argument counsel for plaintiffs on a direct question from the court informed us that if the case were remanded to the District Court, plaintiffs would have no further evidence to offer" (Pet. record to admit into evidence the JICC minutes and 57). *The certiorari petition makes no challenge of this statement by the Sixth Circuit majority.*

Affirming the district court's denial of the reopening

motion, the majority appropriately declared, "if this were held to be error, we would also hold the totality of evidence in this record (including consideration of the proffered evidence), such error was harmless", citing Rule 61, Federal Rules of Civil Procedure (Pet. 59). As the Sixth Circuit has previously recognized in *J. W. Bateson Co., Inc.* v. *Romano*, 6 Cir., 266 F.2d 360, 362, procedural errors not affecting substantial rights of the parties are to be disregarded "in keeping with" Rule 61's mandate.

E. There Is No Conflict Between The Sixth Circuit Majority's Holding And The Third Circuit's Solar Fuel Case

Petitioners' claim of a conflict between the Sixth Circuit majority's holding and that of the Third Circuit in *Solar Fuel Co.* v. *UMW*, 478 F.2d 1401 (July 6, 1973) has no merit.

An initial observation is that *factually*, as to PWC, *Solar* is wholly disparate from the instant *Ramsey* case: the issue in *Solar* of whether PWC was repealed by the 1964 amendment to the National Agreement is not an issue in the instant *Ramsey* case; the district court's *Solar* opinion is wholly devoid of uncontradicted testimony found in *Ramsey* relating to PWC's background (*ante*, pp. 9-12); and its reasons for rejection of the issue of PWC's prior rescission was that its injection "came too late" since it was not raised in pleadings, in pre-trial narrative statements, at pre-trial conference or during the trial.

Response to Petitioners' quoted language from Justice White's opinion (Pet. 33) appears *ante*, pp. 32-33.

F. Petitioners Seek This Court's Review Of Evidence Which Both The District Court And The Sixth Circuit Majority Have Held Did Not Support The Charge That UMW Conspired In Violation Of The Sherman Act

The certiorari petition does not challenge the Sixth Circuit majority's statements that the instant record contains 5,600 pages and 450 exhibits, and that the district court's analysis of the evidence "is masterly" (Pet. 75, 48). This Court recognizes that a conclusion based on inferences drawn from documents or undisputed facts in antitrust cases must be affirmed unless clearly erroneous. Since the findings had the concurrence of the district court and the Sixth Circuit majority, this Court should reject the invitation to review the instant case, implementing its rule that "We do not grant a certiorari to review evidence and discuss specific facts". *U. S.* v. *Johnston*, 268 U.S. 200, 227.

CONCLUSION

For the reasons herein discussed, UMW submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October, 1973

APPENDIX A

Rule 52(a), Federal Rules of Civil Procedure:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . .

Rule 61, Federal Rules of Civil Procedure:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.